

A Chooi Mun Sou & Ors v Ng Seng Kiok & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO
R1-24-69 OF 1992
NIK HASHIM JC
5 APRIL 1997

B *Civil Procedure* — Appeal — Leave to appeal — Application for leave to appeal on a case stated under s 22(3) of the Arbitration Act 1952 — Whether leave to appeal lies to the High Court or the Court of Appeal — Whether there is conflict between s 22(3) of the Arbitration Act 1952 and s 68 of the Courts of Judicature Act 1964 — Courts of Judicature Act 1964 ss 67 & 68 — Arbitration Act 1952 s 22(3)

C *Arbitration* — Procedure — Appeal — Leave to appeal — Application for leave to appeal on a case stated under s 22(3) of the Arbitration Act 1952 — Whether leave to appeal lies to the High Court or the Court of Appeal — Whether there is conflict between s 22(3) of the Arbitration Act 1952 and s 68 of the Courts of Judicature Act 1964 — Courts of Judicature Act 1964 ss 67 & 68 — Arbitration Act 1952 s 22(3)

D Pursuant to s 22(1)(a) of the Arbitration Act 1952 ('the AA'), two questions of law arising in the course of the arbitration were referred to the High Court. The learned judge answered the questions posed in the negative and dismissed the plaintiffs' originating summons.

E The plaintiffs applied for leave from this court to appeal against the decision the judge pursuant to s 22(3) of the AA. At the hearing of the application for leave to appeal, the defendants raised a preliminary objection that the application for leave to appeal ought to be made to the Court of Appeal and not to the High Court on the grounds that:

F (i) the amendments to s 68 of the Courts of Judicature Act 1964 ('the CJA') by the Courts of Judicature (Amendment) Act 1994 ('Act A886') which removed the words 'or a Judge of the High Court' in the section meant that all applications for leave to appeal must in every case be made to the Court of Appeal only; and (ii) the provisions of s 22(3) of the AA in respect of leave from the High Court were inconsistent with the creation of the Court of Appeal and the amendments as stated in (i) above, and therefore, the contradictory provisions in s 22(3) of the AA were impliedly amended by Act A886. The issue before the court was whether an application for leave to appeal on a case stated must be made to the High Court or to the Court of Appeal.

H **Held**, dismissing the preliminary objection:

I (1) The second limb of s 22(3) of the AA stipulates a condition on an appeal on a case stated that leave must first be obtained either from the High Court or Supreme Court. This condition is not inconsistent with s 67 of the CJA as this section itself expressly states that it is '... subject nevertheless to this or any other written law regulating the terms and conditions upon which such an appeal shall be brought'. Therefore, the 'any other written law' in this case is s 22(3) of the AA which clearly sets out its own

terms and conditions for bringing an appeal, that is, leave must first be obtained from either the High Court or the Supreme Court. There is no amendment in force that deletes or provides for the substitution of the High Court in s 22(3), and that being the case, the provisions that '... leave of the High Court ...' still remains in force unaltered (see p 357G-I).

- (2) Section 68 of the CJA sets out certain categories of non-appealable matters. Some of these categories provide that the matter is not appealable unless it is with the leave of the Court of Appeal. The subject matter of the appeal in this case was on a case stated under sub-s 1(a) of s 22 of the AA. In the result, s 68 of CJA is not relevant at all to an appeal on a case stated under the AA. The provisions regulating the terms and conditions upon which an appeal on a case stated under the AA must be construed in the context of that Act and not in that of the CJA and to that extent, the general provisions of the CJA must necessarily yield to the specific provisions of s 22(3) of the AA, and thus, there is no conflict whatsoever between s 22(3) of the AA and s 68 of the CJA. *Generalibus specialia derogant* applies, that is where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law (see p 358B-G); *PP v Chew Siew Luan* [1982] 2 MLJ 119, *Chan Tai Tai & Anor v Official Assignee, FM* [1957] MLJ 54, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 and *Commissioner of Income Tax v Shahzada Nand & Sons* AIR 1966 SC 1342 followed; *TZ Engineering Sdn Bhd v Metroplex Construction Co Bhd* Civil Suit No R2-24-2-96 High Court Kuala Lumpur (unreported) not followed.

[Bahasa Malaysia summary]

Menurut s 22(1)(a) Akta Timbangtara 1952 ('AT'), dua persoalan undang-undang yang timbul semasa timbangtara telah dirujuk kepada Mahkamah Tinggi. Hakim yang arif telah menjawab persoalan yang dikemukakan secara negatif dan menolak saman pemula plaintiff-plaintiff. Plaintiff-plaintiff memohon kebenaran daripada mahkamah ini untuk merayu terhadap keputusan hakim menurut s 22(3) AT. Di pembicaraan permohonan untuk kebenaran merayu, defendan-defendan menimbulkan suatu bantahan permulaan bahawa permohonan untuk kebenaran merayu seharusnya dibuat kepada Mahkamah Rayuan dan bukan kepada Mahkamah Tinggi atas alasan bahawa: (i) pindaan kepada s 68 Akta Mahkamah Kehakiman 1964 ('AMK') oleh Akta Mahkamah Kehakiman (Pindaan) 1994 ('Akta A886') yang memotong perkataan-perkataan 'atau seorang Hakim Mahkamah Tinggi' dalam seksyen tersebut bermakna bahawa semua permohonan untuk kebenaran merayu mestilah dibuat kepada Mahkamah Rayuan sahaja dalam setiap kes; dan (ii) peruntukan s 22(3) AT berkenaan dengan kebenaran daripada Mahkamah Tinggi adalah tidak konsisten dengan kewujudan Mahkamah Rayuan dan

- A pindaan seperti yang dinyatakan dalam (i) di atas, dan maka peruntukan yang bertentangan dalam s 22(3) AT telah dipinda secara tersirat oleh Akta A886. Isu di hadapan mahkamah adalah sama ada suatu permohonan untuk merayu atas kes yang dinyatakan mestilah dibuat kepada Mahkamah Tinggi atau kepada Mahkamah Rayuan.
- B **Diputuskan**, menolak bantahan permulaan:
- C (1) Bahagian kedua s 22(3) AT menetapkan syarat atas rayuan kes yang dinyatakan bahawa kebenaran mestilah diperolehi terlebih dahulu sama ada daripada Mahkamah Tinggi atau Mahkamah Agung. Syarat ini bukanlah tidak konsisten dengan s 67 AMK kerana seksyen ini menyatakan secara jelas bahawa ia adalah '... tertakluk kepada ini atau mana-mana undang-undang bertulis lain yang menguasai terma dan syarat atas mana rayuan sedemikian harus dibawa'. Oleh yang demikian, 'mana-mana undang-undang bertulis lain' dalam kes ini adalah s 22(3) AT yang menyatakan dengan jelas terma dan syarat sendiri untuk membawa sesuatu rayuan, yakni, kebenaran mestilah diperolehi terlebih dahulu daripada Mahkamah Tinggi atau Mahkamah Agung. Tiada pindaan yang berkuatkuasa yang memadamkan atau memperuntukkan penggantian Mahkamah Tinggi dalam s 22(3), dan oleh itu, peruntukan bahawa '... kebenaran Mahkamah Tinggi ...' masih tetap berkuatkuasa tanpa ditukar (lihat ms 357G-I).
- D (2) Seksyen 68 AMK menetapkan kategori tertentu perkara yang tidak boleh dirayu. Beberapa kategori ini memperuntukkan bahawa perkara tersebut tidak boleh dirayu melainkan dengan kebenaran Mahkamah Rayuan. Isi perkara rayuan dalam kes ini adalah atas kes yang dinyatakan di bawah sub-s 1(a) s 22 AT. Oleh itu, s 68 AMK tidak relevan sama sekali kepada rayuan atas kes yang dinyatakan di bawah AT. Peruntukan yang menguasai terma dan syarat atas mana suatu rayuan yang dinyatakan di bawah AT mestilah ditafsirkan dalam konteks Akta itu dan bukan dalam konteks AMK dan setakat itu, peruntukan am AMK mestilah memberikan tempat kepada peruntukan tertentu s 22(3) AT, dan justeru itu, tiada apa-apa percanggahan sama sekali di antara s 22(3) AT dan s 68 AMK. *Generalibus specialia derogant* terpakai, iaitu di mana suatu peruntukan khusus dibuat dalam statut khas, peruntukan khusus itu mengecualikan operasi peruntukan am dalam undang-undang am (lihat ms 358B-G); *PP v Chew Siew Luan* [1982] 2 MLJ 119, *Chan Tai Tai & Anor v Official Assignee, FM* [1957] MLJ 54, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 dan *Commissioner of Income Tax v Shahzada Nand & Sons* AIR 1966 SC 1342 diikuti; *TZ Engineering Sdn Bhd v Metroplex Construction Co Bhd*, Guaman Sivil No R2-24-2-96 Mahkamah Tinggi Kuala Lumpur (tidak dilaporkan) tidak diikuti.]
- E
- F
- G
- H
- I

Notes

For cases on leave to appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 477-506 and 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 784.

Cases referred to

Chan Tai Tai & Anor v Official Assignee, FM [1957] MLJ 54 (folld)
Commissioner of Income Tax v Shahzada Nand & Sons AIR 1966 SC 1342 (folld)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (folld)

PP v Chew Siew Luan [1982] 2 MLJ 119 (folld)

TZ Engineering Sdn Bhd v Metroplex Construction Co Bhd Civil Suit No R2-24-2-96 High Court Kuala Lumpur (unreported) (not folld)

Legislation referred to

Arbitration Act 1952 s 22(1)(a), (3)

Constitution (Amendment) Act 1994 s 46

Courts of Judicature Act 1964 ss 67(1), 68

Courts of Judicature (Amendment) Act 1994

Christopher Leong (Chooi & Co) for the plaintiffs.

RR Sethu and Joseph Yeo (RR Sethu) for the defendants.

Cur Adv Vult

Nik Hashim JC: This is an application by the plaintiffs pursuant to s 22(3) of the Arbitration Act 1952 ('the AA') for leave from this court to appeal against the decision of Abdul Kadir Musa J delivered on 29 November 1996. Pursuant to s 22(1)(a) of the AA, two questions of law arising in the course of the arbitration were referred by way of special case stated for the opinion of the learned judge. The learned judge answered the questions posed in the negative and dismissed the plaintiffs' originating summons. The plaintiffs are dissatisfied with the decision. Hence this application (encl 46).

At the hearing of the application for leave to appeal, En RR Sethu assisted by En Joseph Yeo, for the defendants raised a preliminary objection by saying that the application for leave to appeal ought to be made to the Court of Appeal and not to the High Court. His objection appeared to be founded on two grounds:

- (i) that the amendments to s 68 of the Courts of Judicature Act 1964 ('the CJA') by the Courts of Judicature (Amendment) Act 1994 ('Act A886') on 24 June 1994 which removed the words 'or a Judge of the High Court' in the section means that all applications for leave to appeal must in every case be made to the Court of Appeal only; and

- A (ii) the provisions of s 22(3) of the AA in respect of leave from the High Court are inconsistent with the creation of the Court of Appeal and the amendments as stated in (i) above, and therefore, the contradictory provisions in s 22(3) of the AA are impliedly amended by Act A886.

- B Encik Christopher Leong for the plaintiffs on the other hand, relied his argument on the very words of s 22(3) of the AA which states:

- C A decision of the High Court under this section shall be deemed to be judgment of the High Court within the meaning of section 67 of the Courts of Judicature Act 1964 (which relates to the jurisdiction of the Supreme Court to hear and determine appeals from any judgment of the High Court), *but no appeal shall lie from the decision of the High Court on any case stated under subsection (1) (a) without the leave of the High Court or of the Supreme Court.* (Emphasis added.)

It is to be noted that since 24 June 1994, s 67 was amended by Act A886 which provides for the Court of Appeal instead of Supreme Court, which has the jurisdiction to hear appeals from the High Court.

- D The issue before the court is whether an application for leave to appeal on a case stated must be made to the High Court or to the Court of Appeal.

- E It is the contention of the plaintiffs that the application for leave to appeal to the Court of Appeal in this case is correctly made to the High Court.

Section 67(1) of the CJA states:

- F The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, *subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.* (Emphasis added).

By its provisions, s 67 stipulated that it is the Court of Appeal which has the jurisdiction to hear appeals from the High Court. It does not, however, state how or where leave is to be obtained for an appeal.

- G But the second limb of s 22(3) of the AA stipulates a condition on an appeal on a case stated that leave must first be obtained either from the High Court or Supreme Court. This condition is not inconsistent with s 67 of the CJA as this section itself expressly states that it is '... subject nevertheless to this or any other written law regulating the terms and conditions upon which such an appeal shall be brought'. Therefore, the 'any other written law' in this case is s 22(3) of the AA which to my mind clearly sets out its own terms and conditions for bringing an appeal, that is, leave must first be obtained from either the High Court or the Supreme Court. There is no amendment in force that deletes or provides for the substitution of the High Court in s 22(3), and that being the case, the provisions that '... leave of the High Court ...' still remains in force unaltered. It is significant to note that there has been no amendment to date to change the 'Supreme Court' ('Federal Court', by virtue of s 46 of the Constitution (Amendment) Act 1994 (Act A885)) appearing in the
- H
- I

second limb of s 22(3) of the AA with the 'Court of Appeal'. Thus, to avoid confusion, an amendment should be made accordingly. A

With regard to the defendants' contention that leave to appeal must in every case be made to the Court of Appeal as a result of the deletion of the words 'or a judge of the High Court' in s 68 of the CJA, I with respect, do not agree. Section 68 sets out certain categories of non-appealable matters. Some of these categories provide that the matter is not appealable unless it is with the leave of the Court of Appeal. It is pertinent to note that the subject matter of the appeal in this case is on a case stated under sub-s 1(a) of s 22 of the AA. In the result, I hold that s 68 of CJA is not relevant at all to an appeal on a case stated under the AA. B

Reference was also made by the defendants' counsel to the unreported decision of Abdul Kadir Musa JC (as he then was) (not Azmel J as stated by the defendants' counsel) in *TZ Engineering Sdn Bhd v Metroplex Construction Co Bhd* Civil Suit No R2-24-2-96 High Court Kuala Lumpur where the learned judicial commissioner, on 10 June 1996, dismissed an application for leave to appeal made under s 22(3) of the AA on the ground that as a result of the amendments to the CJA, the application ought to be made to the Court of Appeal and not to the High Court. Unfortunately, there was no written judgment by the learned judicial commissioner in this matter. Without the benefits of his learned written decision, I am with respect, unable to agree with his ruling in that regard. C D

In my judgment, the provisions regulating the terms and conditions upon which an appeal on a case stated under the AA must be construed in the context of that Act and not in that of the CJA and to that extent, the general provisions of the CJA must necessitate yield to the specific provisions of s 22(3) of the AA, and thus, there is no conflict whatsoever between s 22(3) of the AA and s 68 of the CJA. *Generalibus specialia derogant* applies, that is where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law (see *PP v Chew Siew Luan* [1982] 2 MLJ 119, *Chan Tai Tai & Anor v Official Assignee, FM* [1957] MLJ 54, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 (CA) and *Commissioner of Income Tax v Shahzada Nand & Sons* AIR 1966 SC 1342). E F G

That being so, I hold that the application for leave to appeal to this court is properly made, and for the reasons stated above, the defendants' preliminary objection is hereby overruled.

Preliminary objection overruled. H

Reported by Jafisah Jaafar